the area for which the Board was established. But even if it were made out that the Resident Commissioner went beyond his powers in giving to this particular Rural Board the name which he did give it, on the face of it this does not detract in any way from the lawfulness of his action in establishing the Board. If it could be shewn that anyone had been injured, that there had been any deception, that there had been any lack of *bona fides*, then it may be that the establishment of the Board could have been attacked in some way. But there is nothing of the sort here and indeed the reason for giving this particular name is perfectly clear. On 13th April, 1953, the High Commissioner in Nominated Council made an order (L.N. No: 112 of 1953) under section 51 of the Local Authorities Elections Ordinance, 1950, the effect of which was that this particular Board by whatever name it had previously been called was thereafter to be called a Town Council by virtue of the provisions of the Local Authorities Elections Ordinance. It is reasonable to suppose that when he made his order of 18th December, 1952, the Resident Commissioner was aware that this step was in contemplation.

In any event:

> " What's in a name? that which we call a rose
> By any other name would smell as sweet;
> So Romeo would, were he not Romeo called
> Retain that dear perfection which he owes
> Without that title."

With regard to the contention that the provisions of section 398 (which apply not only to Councillors but also to the servants of Boards) are by their nature incapable of application to an area and that they are only capable of application to classes of persons, the point, again, is without substance.

Section 399(1) says that the Resident Commissioner may apply and extend to any local area for which he establishes a Board "all or any of the provisions of this Ordinance .....and thereupon such of them as are for the time being specified in any such notification as aforesaid shall apply and extend to and may be enforced within any such local area". In pursuance of that power the Resident Commissioner has applied in and extended to the area of the Butterworth Town Council a large number of the provisions of the Ordinance including those of section 398.

The object of section 398 clearly is to provide that certain persons connected with the system of local government set up by the Ordinance are to be treated for the purposes of *inter alia* the criminal law as public servants. In the circumstances to say that the provisions of the section are incapable of being applied to and so becoming the territorial law in an area in which that system of local government is brought into being under and by reason of the provisions of the Ordinance itself would be to defeat the remedy of the mischief of the statute.

For the foregoing reasons which substantially follow the reasoning of Rigby J. we allow the appeal and set aside the order of acquittal and discharge made in the Sessions Court.

Perhaps it should be added that we have not overlooked counsel's eloquent plea that to say that Town Councillors could be prosecuted for taking bribes would be in some way to imperil the very existence of the elective principle. We have, however, reflected on the Aristotelian distinction between polity and democracy and have restrained our tears.

Appeal allowed.

Solicitors: *Pillai, Lim, Lee & Hwang.*

COMPTROLLER OF INCOME TAX v. LEE BENG KONG

[O.C.J. (Syed Sheh Barakbah J.) November 11, 1961]

[Alor Star — Civil Suit No. 149 of 1959]

Practice and Procedure — Affidavit — Whether affidavit of merit — Failure to appeal against Income Tax Board of Review's decision — Additional assessment — Whether illegal or ultra vires — Whether final and conclusive — Income Tax Ordinance, 1947, s.80.

This was an application by the defendant by way of motion for an order that the judgment entered against him in default of his delivery of defence be set aside as he had a good defence on the merits and that the additional assessment raised against him was illegal and void. The defendant further requested that the judgment be set aside so that he could file a declaratory suit.

Held: the defendant's affidavit was not an affidavit of merit, and that there was nothing illegal or *ultra vires* in the plaintiff's action as he was acting within the scope of the Income Tax Ordinance, 1947.

Per Curiam: "Section 80 of the Income Tax Ordinance, 1947 states *inter alia* that where the amount of such chargeable income has been determined on objection or appeal, the assessment as made shall be final and conclusive for all purposes of this Ordinance as regards the amount of such chargeable income."

Cases referred to:—

(1) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410.
(2) *Francis* v. *Yiewsley and West Drayton Urban District Council* [1957] 3 All E.R. 529.
(3) *Evans* v. *Bartlam* [1937] 2 All E.R. 646.
(4) *L.W. Cyris* v. *K.G.A. Gunadasa* [1955] M.L.J. 7.

MOTION.

Chang Min Tat for the plaintiff (respondent).

S. A. Raj for the defendant (applicant).

Syed Sheh Barakbah J.: This is an application by the applicant (defendant) by way of Motion for an order that the judgment entered against him in default of his delivery of a defence therein may be set aside on the ground that the applicant has a good defence to this action on the merits, and that the additional assessment raised on him by the respondent (plaintiff) is illegal and *ultra vires*. Applicant further

requests the judgment to be set aside to enable him to file a declaratory suit.

In reply to the applicant's affidavit the respondent files an affidavit setting out fully the facts and proceedings prior to this action.

Mr. Raj, counsel for the applicant, seeks to rely on the cases of *Dyson* v. *Attorney-General*[1] at pages 411 (para 6) and 417 and *Francis* v. *Yiewsley and West Drayton Urban District Council.*[2] In both the above cases it was held that a declaratory action could be taken in the High Court. He also referred to the case of *Evans* v. *Bartlam*[3] at p. 650 and *L. W. Cyris* v. *K. G. A. Gunadasa,*[4] which I shall deal with later.

Mr. Chang Min Tat for the respondent stated applicant had to produce evidence that he had a good defence. The applicant's affidavit was not an affidavit of merit. Respondent was acting within the scope of the Income Tax Ordinance, 1947, and there was nothing illegal or *ultra vires.* The objections made by the applicant were entertained by the respondent and according to para 29 of respondent's affidavit, on the 26th May 1961 the Board of Review dismissed the appeal. The applicant failed to appeal to the High Court and by his failure to do so and under the old provision of section 80 of the Income Tax Ordinance, 1947, the assessment as made was final and conclusive.

As applicant had taken no further steps in the proceedings this suit was filed and judgment obtained in default of defence.

In my opinion, the only question to decide is whether applicant has a good defence to this action. In the case of *L. W. Cyris* v. *K. G. A. Gunadasa supra,* referred to by Mr. Raj, Spenser Wilkinson J. stated —

"The principles which govern the question of setting aside default judgments are laid down by the House of Lords in the case of *Evans* v. *Bartlam,* the relevant part of the headnote of which, as reported in the Times Law Reports, is as follows:—

"**Held,** . . . . . that unless and until the Court has pronounced a judgment, on the merits or by consent, it has the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

The Court of Appeal is not limited to interfering with a Judge's exercise of discretion only if it is of opinion that he acted on some wrong principles of law, but has both the power and the duty to interfere if it is seen that on other grounds the Judge's decision will result in injustice being done."

"xxx xxx xxx If a defendant, who has in fact a complete defence to the claim, has by his own foolishness or carelessness allowed judgment to go by default it appears to me that there will be an injustice, if he is not allowed to put his defence before the Court; and the defendant's fault, if any, can (to use the words of Lord Wright in the same case) "be sufficiently punished by the terms as to costs or otherwise which the Court in its discretion is empowered by the rule to impose."

In the present case, according to the respondent's affidavit, the objections made by the applicant were entertained by the respondent. The applicant was heard and his objections considered. Also his application for extension of time to appeal was dismissed by the Board of Review. No further action was taken by him. Section 80 of the Income Tax Ordinance, 1947, states *inter alia* that where the amount of such chargeable income has been determined on objection or appeal, the assessment as made shall be final and conclusive for all purposes of this Ordinance as regards the amount of such chargeable income. In view of this section, in my opinion, there is no *prima facie* defence to this action. It cannot be said that the applicant has by his own foolishness or carelessness allowed judgment to go by default as he was from the beginning represented by Counsel. In the circumstances the application is dismissed with costs.

Application dismissed.

Solicitors: *Chang Min Tat*; *Gibb & Co.*

ABU HASSAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) November 22, 1961]

[Penang — Criminal Appeal No. 21 of 1961]

Criminal Law and Procedure — Conviction on charge of attempted extortion — Penal Code, s.385 — Whether conviction justified on facts — Whether offence disclosed one under Prevention of Corruption Ordinance, 1950 — If so whether conviction under latter Ordinance could be substituted — Effect of ss.176 and 177, Criminal Procedure Code (Cap. 21).

The appellant, a Customs Officer, was convicted in the Sessions Court, Penang, of the offence of attempted extortion under section 385 of the Penal Code and sentenced to 6 months' imprisonment. The questions on appeal were whether, if the prosecution case was believed (a) the offence disclosed was that of attempted extortion and (b) whether it was open to an appellate Court to substitute a conviction under the appropriate section of the Prevention of Corruption Ordinance if an offence under that Ordinance was disclosed.

Held: (1) the offence disclosed was not that of extortion and if the evidence adduced by the prosecution was to be believed the offence was one under the Prevention of Corruption Ordinance;

(2) for a conviction under the Prevention of Corruption Ordinance to be substituted the test must be whether a charge under that Ordinance could have been framed and tried concurrently with that of extortion. In this instance it could not have been done as (i) the onus is different and (ii) evidence admissible under one charge is not admissible under the other. As the learned President could not have convicted the appellant of an offence under the Prevention of Corruption Ordinance without first amending the charge from one of extortion to one falling under that Ordinance, the appellate Court could not do an act which was not within the competence of the trial court and a conviction under the Prevention of Corruption Ordinance could not therefore be substituted.

Cases referred to:—

(1) *Loh Kwang Seang* v. *Public Prosecutor* [1960] M.L.J. 271.
(2) *Vincent Lee* v. *Rex* [1949] M.L.J. 296.
(3) *Lew Cheok Hin* v. *R.* [1956] M.L.J. 131.
(4) *Nga Po Kyone* v. *Emperor,* A.I.R. 1933 Rangoon 236.
(5) *Begu* v. *Emperor,* A.I.R. 1925 P.C. 130.
(6) *Banta Singh* v. *Public Prosecutor* [1941] M.L.J. 154; [1941] M.L.J. Rep. 127.